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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1801

THE STATE OF NORTH CAROLINA,
Petitioner,

—against—

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN MATHIESON CHEMICAL CORPORATION AND THE UPJOHN COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT AMERICAN CYANAMID COMPANY

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July 12, 1976.

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BRIEF IN OPPOSITION FOR RESPONDENT AMERICAN CYANAMID COMPANY

OPINIONS BELOW

The District Court's opinion is reported at 384 F. Supp. 265 (E.D.N.C. 1973), and is also set out, together with the District Court's further findings of fact, in Appendix C to the Petition. The opinion of the Court of Appeals for the Fourth Circuit is unofficially reported in 1975-2 CCH Trad. Cas. ¶ 60,663, and is set out in Appendix A to the Petition.

RESTATEMENT OF QUESTIONS SOUGHT TO BE RAISED

A. Is there a "conflict between the Circuits on the legal interpretation of U.S. Patent Office documents which are determinative of . . . fraud," as petitioner now asserts

(Petition, p. 5), where both the Fourth and Sixth Circuits have agreed that the documents in question are *not* determinative of fraud and petitioner has conceded in open court that the documents are not determinative of fraud?

B. Should the Court grant certiorari to decide whether administrative findings under Section 5 of the Federal Trade Commission Act may be used offensively by private plaintiffs collaterally to estop respondent Cyanamid in a subsequent action under the antitrust laws where the findings in question,

(1) concerned an element of an antitrust violation (unilateral monopolization) not even alleged in the subsequent action against respondent Cyanamid,

(2) would not be determinative of any issue of antitrust liability in the subsequent action,

(3) would not be admissible as *prima facie* evidence under Section 5(a) of the Clayton Act, and

(4) would not be *res judicata* in a subsequent antitrust action brought by the Government itself.

C. Should the Court grant certiorari to decide whether the term *"mens rea"* or the term *"scienter"* better defines the *Walker Process** standard of "knowing and willful" patent fraud as an element in an antitrust violation, in a case in which the District Court has determined that there was no fraud under any definition of the standard?

D. Should the Court grant certiorari to determine whether the District Court adequately set forth the basis for its conclusions in its Memorandum of Decision and some 466 additional findings of fact?

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* *See Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965).

E. Should the Court grant certiorari in order to substitute its judgment for that of the District Court on the question whether an agreement or understanding in violation of the antitrust laws should properly have been inferred from the testimony and other evidence considered by the District Court?

F. Should the Court grant certiorari in order to determine whether the Court of Appeals for the Fourth Circuit erred in holding that the District Court's findings of fact were not clearly erroneous?

STATEMENT

Petitioner asserts that this is a case of "obvious weight and complexity" (Petition [hereafter "Pet."] at 2), involving allegations of conspiracy to exclude competitors and fix prices which have been extensively litigated against the five respondent drug companies by the Government and numerous claimants over two decades. As in the related cases that have gone to final judgment, however, the District Court concluded that those allegations were not sustained by the evidence. *E.g.* Petition, Appendix [hereinafter "Pet. App."] C at 416a.

The Federal Trade Commission Case

In the early proceedings before the Federal Trade Commission, despite its more flexible standards of proof, the Commission unanimously dismissed in 1963 the charges of conspiracy to obtain a patent by fraud, to monopolize, and to exclude competitors (*In the Matter of American Cyanamid Co.*, 63 F.T.C. 1747, 1862-63, *vacated and remanded*, 363 F.2d 757 (6th Cir. 1966)), and ultimately dismissed the last of the conspiracy charges (price-fixing) by a 2-2 vote in 1967. 72 F.T.C. 623, 688-90, *aff'd sub. nom., Charles Pfizer & Co.* v. *Federal Trade Commission*, 401 F.2d 574 (6th

Cir. 1968), *cert. denied,* 394 U.S. 920 (1968). The Commission did hold that respondents Pfizer and Cyanamid had each independently, without conspiracy, employed an unfair method of competition by making inadequate disclosures to the Patent Office in connection with their respective applications for a patent on the antibiotic, tetracycline, which had ultimately issued to Pfizer in 1955. The Commission's conclusion as to Cyanamid fell short of a finding of knowing and willful fraud.*

The Criminal Case and the Commencement of Private Treble Damage Litigation

Petitioner's case was one of a flood of private treble-damage actions commenced after a jury convicted respondents Cyanamid, Pfizer and Bristol-Myers in 1967 of a criminal antitrust conspiracy to exclude others from the tetracycline business and to fix prices.** Petitioner was no doubt hopeful that the conviction obtained by the Government would be available to it under Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)) as prima facie evidence of its allegations. On appeal, however, the Court of Appeals for the Second Circuit reversed the conviction for errors by the trial judge in charging the jury (*United States* v. *Chas. Pfizer & Co.*, 426 F.2d 32 (2d Cir. 1970), *rehearing en banc denied,* 437 F.2d 957), and the reversal was affirmed

* The Commission found that Cyanamid withheld information from the Patent Office which it "knew or had reason to believe" was relevant. 72 F.T.C. 623, 688. In affirming, the Sixth Circuit stated that "[w]e agree with the Hearing Examiner that 'if Cyanamid's patent representative did not know the true facts, he was nevertheless under a duty to know them and under a duty to reveal the truth to the patent examiner.'" *Charles Pfizer & Co.* v. *F.T.C., supra,* 401 F.2d 574, 583 (6th Cir. 1968).

** The two remaining respondents, Olin Mathieson Chemical Corporation and The Upjohn Company, were named as co-conspirators but not indicted.

upon an equal division of this Court. 404 U.S. 548 (1972). On remand, the case was retried to the court on the original record, and the three respondents were acquitted. 367 F. Supp. 91 (S.D.N.Y. 1973).

The Course of the Private Treble Damage Litigation

After reversal of the criminal case, petitioner and other plaintiffs asserted that the Federal Trade Commission's determinations as to use of unfair methods of competition by respondents Pfizer and Cyanamid were themselves entitled to prima facie weight under Section 5(a) of the Clayton Act; but this claim was rejected on the ground that those determinations were not "under the antitrust laws" as required by that section. *In re Antibiotic Antitrust Actions,* 333 F. Supp. 317, 322 (S.D.N.Y. 1971). Petitioner did not appeal the point and has not raised it in its Petition here.

In the course of the litigation, respondents attempted to settle most of the private treble damage actions (including this one).* In approving settlement of 66 of the cases, the Hon. Inzer Wyatt of the Southern District of New York pointed out that there were no ultimate findings in the Government proceedings that showed, "even prima facie," a violation of the antitrust laws, and said that his own review of the prior government litigation had led him to conclude that "the chances of recovery in any of these cases are no better than 50-50 and probably should more realistically be called slight." *State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710, 741-42 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir. 1971), *cert. denied sub. nom., Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.*, 404 U.S. 871 (1971).

* North Carolina rejected an offer of settlement in accordance with a formula that was accepted by 43 other States. *See* 314 F. Supp. 710 at 724.

Coordinated pretrial proceedings in the "non-settling" cases (including this one) were undertaken by the Hon. Miles W. Lord of the District of Minnesota, who was temporarily assigned to the Southern District of New York for the purpose. While so assigned, Judge Lord transferred the cases to the District of Minnesota for further pretrial and for trial, pursuant to 28 U.S.C. § 1404(a). There, discovery continued for several years. In 1973, petitioner North Carolina moved for a remand of its case to the Eastern District of North Carolina for trial before the Hon. Franklin T. Dupree, asserting that it had completed discovery, that its theories and strategies were materially different from those of the other plaintiffs, and that, unlike them, it intended "to rely heavily upon evidence adduced by the Federal Trade Commission and the Anti trust Division of the United States Government in earlier proceedings involving the transactions alleged in plaintiff's complaint." Affidavit of Deputy Attorney General Benoy In Support of Motion for Change of Venue, September 28, 1972, p. 12. Substantially all of the remaining civil cases transferred to the District of Minnesota (except an action by the United States for single damages and a number of cases in which foreign governments assert a right to sue for treble damages under our antitrust laws) have since been settled.

Trial of Petitioner's Case

Petitioner's case against Cyanamid and the other respondents was brought and tried entirely on charges that they had conspired together in violation of the antitrust laws. In the course of its closing argument petitioner belatedly asserted that its complaint should be construed so as to charge respondent Pfizer with attempted unilateral monopolization (Pet. App. C at 363a, footnote 5), but no such claim was ever asserted, even orally, against Cyana-

mid. The District Court's opinion describes petitioner's allegations by directly quoting from petitioner's trial brief. Pet. App. C at 361a. The central issue as to Cyanamid was whether an agreement negotiated between Cyanamid and Pfizer in mid-November 1953, to resolve a blocking-patent situation which threatened to prevent either company from marketing the new antibiotic, tetracycline, was accompanied by further and unlawful agreements (the "first and second schemes," as petitioner termed them) to exclude competitors and fix prices.

Petitioner's case consisted almost entirely of documentary evidence, the transcripts of testimony in prior Government proceedings, and a lengthy pretrial examination of the patent examiner who had ultimately approved issuance of a patent on tetracycline to respondent Pfizer in 1954. Cyanamid presented in its defense the "live" testimony of six fact witnesses and two experts, as well as much new evidence that had been developed in the course of extensive discovery following the Commission proceeding and the criminal case. After 42 days of trial, the District Court considered the case for a further five months before filing its judgment and Memorandum of Decision, which concluded that petitioner had failed to prove the alleged violations of the antitrust laws.

In view of petitioner's avowed strategy of reliance upon transcripts of prior proceedings in which the Government had also failed to prove its charges of conspiracy and collusion, the District Court's decision cannot have come as a surprise.

SUMMARY OF ARGUMENT

The Petition Raises No Question Which Justifies the Grant of the Writ

Petitioner's essential argument in this Court appears to be that it "has been denied *justice according to law*." Pet. 49.

The claim is incredible in view of the fact that petitioner was afforded a full and fair opportunity to prove its case against respondents but was unable to do so. Far from suffering a doleful "plight of the private antitrust litigant in a complex major antitrust action" as it suggests here (Pet. 48), the State of North Carolina benefitted from evidence and an exhaustive record previously developed by the Government in the Federal Trade Commission and criminal cases.* Petitioner was also able to combine forces with the Federal Government, numerous States of the Union, and countless other claimants, to subject the respondent drug companies to still further discovery, in total perhaps the most searching and sustained scrutiny of antitrust defendants in legal history. After a review of the evidence so amassed the District Court concluded that it did not sustain petitioner's case. And here petitioner appears to complain that "monumental . . . discovery" (Pet. 48) somehow denied it justice, as though plaintiffs' discovery of respondents' business somehow had been carried out for the benefit of respondents.

Having failed to prove its claims in the District Court, petitioner approached the Fourth Circuit, and now approaches this Court, with an extended but highly selective recital of the evidence (see Pet. 15-34), which omits substantially all of the evidence favorable to respondents

* This Court has noted that prior Government litigation may aid the private litigant even if it does not result in a judgment which is admissible as prima facie evidence. *See Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965). "The Government's initial action may aid the private litigant in a number of other ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. . . . The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties." *Id.* at 319.

that the District Court found convincing. Each of the questions petitioner seeks to raise on this petition was argued in one form or another before the Fourth Circuit. See extract from Appellant's Brief before the Fourth Circuit, Pet. App. H at H2-H11. After careful consideration, the Fourth Circuit found each of them without substance.

Three of petitioner's six "Questions Presented for Review" (Questions A, C and E) are in fact "phantom" issues not presented in the case at all, but apparently advanced here in the hope that the Court may use them as vehicles for a reappraisal of the evidence. Thus, there is no conflict of the Circuits under Supreme Court Rule 19(1)(b). *See* "A", *infra*, p. 10. The District Court found that Cyanamid had acted in good faith, not that it had committed fraud under either of the definitions suggested by petitioner. *See* "C", *infra*, p. 16. And the District Court did not hold that an "express agreement" was essential to a violation of the antitrust laws, but concluded that Cyanamid had not entered any "agreement or understanding, express or implied." Pet. App. C at 650a. *See* "E", *infra*, p. 19.

A fourth question (B) as to collateral estoppel is also not presented here as to respondent Cyanamid, since the Federal Trade Commission and the District Court were called upon to decide different factual and legal issues.

Two other questions (D, F) present the claim that the District Court's findings were inadequate to set forth the basis for its decision, or were clearly erroneous, and frankly invite the Court to review the facts in this case.

None of petitioner's questions merits the grant of certiorari.

ARGUMENT

A. There is No Conflict of Decisions.

The Federal Trade Commission and the District Court for the Eastern District of North Carolina considered different evidence and decided different issues of law arising under different statutes. The Commission concluded that respondents Cyanamid and Pfizer had each independently, without conspiracy, employed unfair methods of competition (Federal Trade Commission Act, § 5), and the District Court concluded that respondents had not conspired to restrain trade or monopolize. Both decisions were affirmed under the appropriate standards of review, the former by the Sixth Circuit as supported by substantial evidence (15 U.S.C. § 45 (c), 5 U.S.C. § 706(2)(E)), the latter by the Fourth Circuit as not clearly erroneous. Fed. R. Civ. P. 52(a); *see* Pet. App. A at A28.

Petitioner apparently concedes, as it must, that an "unfair method of competition" under the flexible standards of the Federal Trade Commission Act need not rise to the level of an antitrust violation (*F.T.C.* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972)), and that there is no "conflict" between the results achieved in the two Circuits. Rather, petitioner asserts that a "conflict" is to be found in the Circuits' respective "legal interpretation[s] of U.S. Patent Office records which are determinative of the same issue of fraud." Pet. 5, Question A.

Like the Fourth Circuit in the present case, however, the Sixth Circuit agreed that the Patent Office documents were *not* determinative of fraud and held that the Commission's initial decision to overrule its own hearing examiner and hold that those records showed fraud was "based upon inferences and speculation which are insufficient to constitute substantial evidence." *American Cyanamid Co.* v. *F.T.C.*, *supra*, 363 F.2d 757, 779 (6th Cir. 1966). It was for

this reason that the Sixth Circuit remanded the proceeding to the Commission, to require that ambiguities in the Patent Office documents be clarified by the testimony of the patent examiner (H. J. Lidoff) who processed the applications. *Ibid.* Thereafter, with an explanation of the records by Lidoff, the Commission adhered to its decision and the Sixth Circuit affirmed the decision as supported by substantial evidence. *Charles Pfizer & Co.* v. *F.T.C.*, *supra*, 401 F.2d 574, 585. Of course the affirmance fell far short of a determination that either respondent had violated the antitrust laws in prosecuting its application for a patent.*

In the present case petitioner itself conceded that the Patent Office documents were not determinative of the issue of knowing and willful fraud and that the testimony of patent examiner Lidoff was essential to support its claim of an antitrust violation. In its opinion the District Court quoted the following exchange between the court and counsel for the petitioner:

> THE COURT: Without the testimony of Lidoff do you agree that reasonable minds could differ on the interpretation of the patent record?
>
> MR. BENOY: Well, without Lidoff being there, I would have to say reasonable minds could differ because we have opposed findings.
>
> THE COURT: Next question: Does your case on the patent issue, then, assuming that reasonable minds could differ on the record without his testimony, depend first upon the admissibility of the Lidoff testimony and second its believeability?
>
> MR. BENOY: Well, given the assumption that reasonable minds could differ on the evidence it just

* As an alternative ground for its conclusion against respondent Pfizer, which had obtained the patent on tetracycline, the Commission held that Pfizer had unilaterally attempted to monopolize in violation of Section 2 of the Sherman Act, but the Sixth Circuit found it unnecessary to reach this question in affirming the Commission's ultimate conclusion that Pfizer had employed an unfair method of competition.

has to follow, yes, sir, that it is crucial to the ca[illegible] I would not contend otherwise. Pet. App. C at 399a.*

Thus, there is no basis whatever for petitioner's present contention that Patent Office records are "determinative" of fraud or that its "Question A" is presented in this case.**

B. The Court of Appeals for the Fourth Circuit was Correct in Finding no Basis for Collateral Estoppel in this Case.

In the present case, petitioner did not charge respondent Cyanamid with unilateral monopolization or attempt to monopolize under Section 2 of the Sherman Act, but with conspiracy.*** The only theory on which petitioner could have recovered against Cyanamid was to prove that it had conspired with others in violation of Section 1 or 2 of the Sherman Act. *See Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954). Neither the Federal Trade Commission nor the Sixth Circuit found there was a conspiracy. To the contrary, the Commission dismissed all the conspiracy charges. And in

* Upon consideration, the District Court noted Lidoff's lapses of memory (Pet. App. C at 401a) and found his testimony "lacking in that degree of probative force necessary to carry plaintiff's heavy burden of establishing fraud by 'clear, unequivocal and convincing' evidence, a standard which all parties agree applies here." Pet. App. C at 400a.

** Petitioner suggests (Pet. 4) that a further "conflict" might be found in the Eighth Circuit's statement (*Pfizer Inc.* v. *Lord*, 456 F.2d 545, 551 (1972), *cert. denied*, 406 U.S. 976 (1972)) that the F.T.C. proceedings could be taken to establish a "prima facie" case of fraud, but that decision was for the discretionary purpose of setting the bounds of discovery in a subsequent damage action, not a determination on the merits.

*** Petitioner could not state a claim against Cyanamid based on unilateral violation of Section 2 under *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corporation*, 382 U.S. 172 (1965) (fraud on the Patent Office followed by enforcement of the fraudulently procured patent to dominate a relevant market), since Pfizer, not Cyanamid, ultimately obtained and enforced the patent on tetracycline.

the present case the District Court not only found there was no conspiracy (Pet. App. C at 416a) and no "collusion" to obtain a patent (Pet. App. C at 407a), but it held that Cyanamid had "acted in good faith and did not intentionally or knowingly misrepresent or withhold material information from the Patent Office." Pet. App. C at 601a.*

Even if the Sixth Circuit's affirmance of the Commission's decision were conclusive in the present case, it would fall far short of establishing an antitrust violation in which conspiracy is an essential element. Independent misconduct before the Patent Office would be "relevant only insofar as [it] supported an inference that . . . [Pfizer and Cyanamid] had entered into agreements to fix prices or to exclude others." *United States* v. *Chas. Pfizer & Co., supra*, 426 F.2d 32, 41 (2d Cir. 1970). Such misconduct would be merely evidentiary, a "mediate datum" which might or might not contribute to an ultimate inference of conspiracy.** But the rule is clear, for purposes of collateral estoppel, that "no fact decided in the first [proceeding] . . . conclusively establishes any 'mediate datum' in the second, or anything except a fact 'ultimate' in that suit." *The Evergreens* v. *Nunan*, 141 F.2d 927, 931 (2d Cir. 1944) (L. Hand, J.), *cert. denied*, 323 U.S. 720 (1944). "The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding." *Yates* v. *United States*, 354 U.S. 298, 338 (1957).

* The finding as to Cyanamid's good faith was also consistent with the Federal Trade Commission's determination, since the Commission concluded that Cyanamid had withheld information, but not that it had done so knowingly and willfully. See *supra*, p. 4, footnote*. *Cf. Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965).

** Indeed, in the criminal case the Hon. John M. Cannella finally concluded that the Patent Office aspect of the case "fails to support an inference that Pfizer and Cyanamid had entered into agreements to fix prices or to exclude others." *United States* v. *Chas. Pfizer & Co.*, 367 F. Supp. 91, 97 n.9 (S.D.N.Y. 1973).

i. Since Different Issues Were Decided There Was No Occasion for Collateral Estoppel

In the present case, the Fourth Circuit recognized that the issues before the Commission had arisen under "a regulatory statute much broader in its scope than the Clayton and Sherman Acts under which the present litigation was instituted" (Pet. App. A at A21), and noted that the Sixth Circuit, "acting under the review statute, merely found that there was substantial evidence to support the Commission's conclusions." Pet. App. A at A20-A21. The Fourth Circuit stated: "While we are not disposed to hold that an administrative proceeding can never be the basis for a plea of collateral estoppel, we do not think it would be appropriate to accord such effect to the Commission's Section 5 proceeding in the present case." Pet. App. A at A21. This was because disparate issues were litigated in the two cases, and the Fourth Circuit held that "the proceeding before the Commission did not afford Pfizer and Cyanamid a 'fair opportunity procedurally, substantively and evidentially', to litigate the issue raised in the present case." Pet. App. A at A20. Thus, the Fourth Circuit held there was no occasion in this case to decide whether *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971), should be extended to allow offensive use of collateral estoppel against the defendants who lost in prior administrative proceedings.*

ii. In Antitrust Cases the Effect of Prior Determinations Is Fixed by Statute

Even had there been an identity of issues, the Fourth Circuit concluded that an administrative determination

* In *Blonder-Tongue* this Court held that a decision in a patent infringement suit that the patent sought to be enforced was invalid may be used *defensively* against the patentee if he again attempts to enforce the same patent. *Technograph Printed Circuits, Ltd.* v. *Martin-Marietta Corp.,* 474 F.2d 798 (4th Cir. 1973), cited by petitioner (Pet. 38), was merely an application of *Blonder-Tongue* on similar facts.

under the flexible standards of Section 5 of the Federal Trade Commission Act should not have conclusive effect in a subsequent antitrust action, since Congress has established that even conviction in a criminal antitrust case does not result in collateral estoppel, but is accorded only prima facie weight. 15 U.S.C. § 16(a).*

Congress confirmed its intention to make collateral estoppel unavailable in antitrust cases in 1955, when it granted the Government a right to sue for single damages (15 U.S.C. § 15a) but purposefully declined to stiffen Section 5(a) of the Clayton Act to provide that judgments in criminal cases and Government enforcement actions should result in collateral estoppel, and made clear that actions for damages alone, whether brought by the Government or private parties, do not even have prima facie weight in subsequent litigation. 15 U.S.C. § 16(a). *See Note, Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions,* 85 Yale L.J. 541, 549-555 (1976). In so doing, Congress confirmed that the Clayton Act preempted the common law of collateral estoppel as it relates to establishment of antitrust violations.

The Federal Trade Commission Act itself makes clear that collateral estoppel "under the antitrust laws" does not result against the Government when it is unsuccessful in a Commission proceeding (15 U.S.C. § 45(e)), and, as the Court of Appeals concluded, it would be "strangely unfair" (Pet. App. A at A22) to contend that the Government, but not respondents, may relitigate determinations by the Commission which become relevant in subsequent antitrust actions. The Government itself has continued to litigate its antitrust damage claim against respondents, but it has

* As noted above, petitioner did not appeal the District Court's holding that a determination under Section 5 of the Federal Trade Commission Act is not entitled to prima facie effect under Section 5(a) of the Clayton Act. *In Re Antibiotic Antitrust Actions,* 333 F. Supp. 317, 322 (S.D.N.Y. 1971).

never contended that it could derive an estoppel from its earlier proceeding in the Federal Trade Commission. *Cf. United States* v. *Grinnell Corp.*, 307 F. Supp. 1097 (S.D.N.Y. 1969) (despite identity of parties, judgment in Government enforcement suit did not result in collateral estoppel in subsequent Government antitrust damage action, in view of statutory preemption giving such judgment only prima facie weight. 15 U.S.C. § 16(a)). As the Fourth Circuit observed, third parties who did not even participate in the proceeding before the Commission can hardly derive a more conclusive effect from that litigation than do the parties litigant themselves. Pet. App. A at A22-A23.

The Fourth Circuit was clearly correct in finding no basis for a collateral estoppel in the circumstances of this case.

C. Petitioner's Question Purporting to Contrast *"Mens Rea"* and *"Scienter"* as Alternative Standards of Fraud Under the *Walker Process* Case is Not Presented for Review, Since the District Court Found Petitioner had Not Proved Its Case Under Any Standard of Fraud.

Petitioner concedes (Pet. 8) that the *Walker Process* case makes "knowing and willful" misrepresentations to the Patent Office an essential element of the antitrust violation described in that case. *See* 382 U.S. 172 at 177. Petitioner suggests, however, that the District Court went beyond the requirements of *Walker Process* and held that something more than a "knowing and willful" misrepresentation, referred to as a *"mens rea,"* was essential to establish the violation, whereas, in petitioner's view, the District Court should have been satisfied with something else, which petitioner describes as *"scienter,* not *mens rea."* Pet. 41.

Despite petitioner's suggestion, however, the District Court concluded that petitioner had not established its case under *any* standard of knowing and willful fraud. It held

that "Cyanamid acted in good faith and did not intentionally or knowingly misrepresent or withhold material information from the Patent Office" (Pet. App. C at 601a), and that "[a]t best the evidence has left the court with the impression that there was a mutual misunderstanding between Lidoff and Pfizer's representatives as to what Lidoff wanted established." Pet. App. C at 409a. Thus, petitioner's effort to delineate two allegedly contrasting standards of fraud is not relevant to the present case.

Petitioner went on to urge the District Court to hold that "the alleged negligent failure of [respondents] to disclose pertinent information to the Patent Office" (Pet. App. C at 413a) should be held to constitute a violation of the antitrust laws, but the District Court properly declined, as such negligence would not even be regarded as sufficiently culpable to justify a court in holding an otherwise valid patent unenforceable. In rejecting petitioner's argument the District Court cited the view of the Hon. Walter R. Mansfield, recently approved by the Eighth Circuit,* that,

> the stringent standard urged by defendants is unnecessary to protect the public, and that an applicant for a patent should be accorded the right to exercise good faith judgment in deciding what matters are and are not of sufficient relevance and materiality to require disclosure. Only when he is guilty of fraud, willfulness or recklessness indicating a disregard for his duty of frankness should enforcement of the patent be barred. *Xerox Corporation* v. *Dennison Manufacturing Co.*, 322 F. Supp. 963, 968-69 (S.D.N.Y. 1971).

The District Court properly concluded that this degree of misconduct had not been proved (*see, e.g.,* Pet. App. C at 601a), and concluded that there was no fraud of any sort on which to premise an antitrust violation.

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* See *Pfizer, Inc.* v. *International Rectifier Corp.*, No. 75-1695 (8th Cir., June 16, 1976).

D. The District Court's Memorandum of Decision and Some 466 Findings of Fact Adequately Set Forth the Basis for Its Conclusions.

Petitioner appears to contend that the District Court did not adequately set forth the basis for its conclusions, and asserts that it should have been required to respond to numerous argumentative points. Pet. 43. The Court of Appeals found no merit in this claim and made no comment upon it. In fact, the points petitioner refers to were adequately covered by the District Court's findings of fact. Thus, the *"purposes"* (Pet. 42) of settlement of the blocking-patent situation were established by the District Court's decision. Pet. App. C at 381a-386a, 566a. Petitioner's argument that the District Court should have made findings as to unspecified *"restrictive operating practices"* (Pet. 43) is too vague to require comment. The District Court considered and rejected all significant aspects of petitioner's claims, in addition to the alleged conspiracy. *See, e.g.,* Pet. App. C at 416a *et seq.* Respondents' access to competitors' price information, for example, is adequately disposed of in finding No. 80. Pet. App. C at 619a. The District Court's extensive findings of fact serve to distinguish the various cases petitioner cites. Petitioner's quotation from Mr. Justice White's concurrence in *United States* v. *Singer Mfg. Co.,* 374 U.S. 174, 199-200 (1963), to the effect that an antitrust violation may result from "collusion among applicants to prevent prior art from coming to or being drawn to the [Patent] Office's attention" (Pet. 44), gives petitioner no support whatever, since the District Court held it was "unable to find that such collusion existed. There are, in fact strong indications to the contrary." Pet. App. C at 407a.

Petitioner's real complaint appears to be not that the District Court did not make further findings on miscellaneous subjects, but that the findings the court did make denied it recovery.

E. Contrary to Petitioner's Assertion, the District Court Did Not Hold that "Direct Evidence" or an "Express Agreement" Was Essential to Establish a Violation of the Sherman Act.

Petitioner offers no citation to the record to support its claim that the District Court held "an 'express agreement' to exclude competitors" was essential to establish an antitrust violation. Pet. 45. Of course the District Court made no such statement. To the contrary, it held that Cyanamid "did not enter into any conspiracy, agreement or understanding, *express or implied,* with any of its competitors as to price, dosage forms or customer classifications." Pet. App. C at 650a [emphasis added].

Nor did the court hold that a conspiracy could be inferred only from "direct evidence." See Pet. 11. Rather, in view of the complaint's very specific allegations of concerted "schemes," the District Court deemed it significant that, despite extended litigation over many years, neither the Government nor petitioner had succeeded in finding a witness to corroborate the charges. Pet. App. C at 390a. The District Court's analysis did not end at this point, however, since it went on to consider all other evidence supporting petitioner's conspiracy claim, and then, having concluded that no conspiracy was proved, undertook "the task of examining all other evidence in the record to ascertain if inferences arise thereon sufficient to sustain plaintiff's restraint of trade and monopoly charges." Pet. App. C at 416a. In these other areas, too, the District Court found "the inferences conflicting and of insufficient force to carry plaintiff's burden of persuasion." *Ibid.*

Petitioner's argument on this point merely asks this Court to substitute its judgment as to the weight of the evidence for the judgment of the District Court.

F. The Court of Appeals for the Fourth Circuit Correctly Held that the District Court's Findings of Fact Were Not Clearly Erroneous.

Petitioner asserts that the District Court's findings "can be shown to be internally inconsistent" (Pet. 47), but the only "example" it offers is a chart (Pet. 14) which is not inconsistent at all, but faithfully bears out the District Court's statement that:

> [D]uring all of the period under consideration, 1953-1961, Parke, Davis & Company was selling its broad spectrum antibiotic, Chloromycetin, at prices identical with those being charged by defendants for their broad-spectrums. Yet it has never been charged that Parke, Davis was involved in the conspiracy. Pet. App. C at 422a.

A glance at the chart shows that the price variations to which petitioner seeks to draw attention occurred from July 1960 to 1966, *subsequent* to the "period under consideration" by the District Court. Petitioner's cryptic quotation (Pet. 14) from the District Court's opinion (Pet. App. C at 424a) achieves the appearance of inconsistency only by omitting any reference to the relevant time frame.

Petitioner does not particularize its claim as to other "clearly erroneous" findings and the Court of Appeals correctly held the argument to be devoid of merit.

CONCLUSION

Petitioner fails to identify any plausible or significant legal issues presented for review. The questions it seeks to raise reflect little more than its dissatisfaction with the District Court's findings of fact. But as the Court of Appeals properly observed (Pet. App. A at A28):

> It is not enough that we might give the facts another construction, resolve the ambiguities differently and find a more sinister cast to actions which the district court apparently deemed innocent. . . . We are not given those choices because our mandate is not to set aside findings of fact "unless clearly erroneous." *United States* v. *Real Estate Boards,* 339 U.S. 485, 495 (1950).

For the same reason this Court should deny certiorari.

Respectfully submitted,

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